

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Petition for Forbearance from)	WC Docket No. 03-157
the Current Pricing Rules for)	
the Unbundled Network Element Platform)	
)	

**REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES
ON PETITION FOR EXPEDITED FORBEARANCE**

David C. Bergmann
Assistant Consumers' Counsel
Chair, NASUCA Telecommunications
Committee
bergmann@occ.state.oh.us
Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
Phone (614) 466-8574
Fax (614) 466-9475

NASUCA
8300 Colesville Road (Suite 101)
Silver Spring, MD 20910
Phone (301) 589-6313
Fax (301) 589-6380

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I. Introduction

The National Association of State Utility Consumer Advocates (“NASUCA”)¹ submits these reply comments on the Petition for Expedited Forbearance (“Petition”) filed on July 1, 2003 by the Verizon Telephone Companies (“Verizon”).² Verizon’s Petition is supported by only four commenters.³ Verizon’s supporters are those who, like Verizon, currently have market power and desperately want to keep it. To that end, they

¹ NASUCA is an association of 42 consumer advocates in 40 states and the District of Columbia. NASUCA’s members are designated by the laws of their respective states to represent the interests of utility consumers before state and federal regulators and in the courts.

² See Public Notice, DA 03-2189 (rel. July 3, 2003). An Order released July 15, 2003 extended the date for comments to August 18, 2003 and for reply comments to September 2, 2003.

³ This includes ACS of Anchorage, Inc. (“ACS”); Qwest Corporation (“Qwest”); SBC Communications Inc. (“SBC”) and the United States Telecom Association (“USTA”). On July 31, 2003, SBC, BellSouth Inc. and Qwest (“SBC/BS/Q”) filed a joint Petition for Expedited Forbearance. This Petition requested sought the same relief requested by the Verizon Petition, and added no new information to support the relief. The Joint Petition merely attached the Verizon Petition as support. A Public Notice was issued on August 18, 2003, requesting comment on the SBC/BS/Q Petition by September 16, 2003. It is to be hoped that SBC/BS/Q will explain at some point why they felt compelled to file their duplicative Petition.

argue that much of the current local exchange competition is “artificial,”⁴ and blame all the woes of the telecommunications sector on the allegedly under-priced unbundled network element platform (“UNE-P”). The UNE-P they complain about is priced using the total element long-run incremental cost (“TELRIC”) standard created by the Federal Communications Commission (“FCC”) and approved by the Supreme Court in *Verizon*.⁵ The arguments were presented to the Commission -- and rejected -- in the proceedings that led to the recent *Triennial Review Order*.⁶

Notably, Sprint Corporation (“Sprint”) -- whose subsidiaries include incumbent local exchange companies (“ILECs”) that are subject to the TELRIC standard⁷ -- opposes the Petition. Other ILECs are conspicuous by their silence.

The commenters opposing Verizon’s request to eliminate the UNE-P include competitors who currently use the UNE-P to give consumers choices for their local exchange service.⁸ Opposition also comes from state regulators, who have continually

⁴ See SBC at 14.

⁵ *Verizon Communications v. FCC*, 535 U.S. 467, 122 S. Ct. 1646 (2002).

⁶ *In the Matter of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, et al., Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36 (rel. August 21, 2003) (“*Triennial Review Order*”).

⁷ Some Sprint ILEC subsidiaries, like United Telephone Company of Ohio d/b/a Sprint, appear never to have offered the UNE-P. Sprint recently announced, largely as a result of the *Triennial Review Order*, that it was rolling out local service in other ILECs’ territories throughout the nation. See http://www3.sprint.com/PR/CDA/PR_CDA_Press_Releases_Detail/0,3681,1111769,00.html. It is to be hoped that this is more genuine than SBC’s and Verizon’s promises for national competition made in the context of their mergers.

⁸ A+ American Discount Telecom, LLC and 13 other parties (“A+, et al.”); Association of Communications Enterprises, Cimco Communications, Inc. and Granite Telecommunications, Inc. (“ASCENT, et al.”); AT&T Corp. (“AT&T”); BridgeCom International, Inc. (“BridgeCom”); Competitive Telecommunications Association (“CompTel”); Covad Communications (“Covad”); Focal Communications Corporation, McLeodUSA Telecommunications Services, Inc. PacWest Telecomm, Inc. and TDS Metrocomm, LLC (“Focal, et al.”); MCI; the PACE Coalition (“PACE”); Sage Telecom, Inc. and Talk America Inc. (“Sage”); Telscape Communications, Inc. (“Telscape”); TEXALTEL f/k/a Southwest Competitive Telecommunications Association (“TEXALTEL”); Western Communications, Inc. d/b/a Logix

reduced TELRIC prices -- including those for the UNE-P -- as the result of detailed state-level examinations.⁹ No court has found any of these reductions to have been unlawful or even unreasonable. NARUC's comments relate that at its Summer 2003 meeting, NARUC adopted, with "little disagreement," a resolution urging the Commission to reject Verizon's Petition.¹⁰ NARUC's comments succinctly state, "[I]t is clear that national forbearance is premature."¹¹ Further, as the NJBPU states, "Verizon's request cannot and should not be entertained by the FCC. It is both procedurally and factually flawed and is an attempt to circumvent the FCC's rulemaking process."¹²

Opposition to eliminating the UNE-P also came from consumer advocates, including NASUCA and one of its individual members.¹³ These commenters represent the consumers who benefit from the competition created by the UNE-P.

Neither the state commissions nor consumer advocates have any desire for "artificial" competition. From that perspective, the incumbents' attacks on TELRIC are, at base, an attack on the capabilities of the state commissions throughout the country who

Communications ("Logix"); WorldNet Telecommunications, Inc. ("WorldNet"); and Z-Tel Communications, Inc. ("Z-Tel").

⁹ California Public Utilities Commission ("CPUC"); Florida Public Service Commission ("FPSC"); National Association of Regulatory Utility Commissioners ("NARUC"); New Jersey Board of Public Utilities ("NJBPU"); New York Department of Public Service ("NYDPS"); and Pennsylvania Public Utility Commission ("PAPUC").

¹⁰ NARUC at 1; see <http://www.naruc.org/Resolutions/2003/summer/telecom/verizon.shtml>.

¹¹ NARUC at 2.

¹² NJBPU at 1.

¹³ New Jersey Division of the Ratepayer Advocate ("NJRPA").

have set the TELRIC rates. Given the lack of successful legal challenge to the state commission findings,¹⁴ these collateral attacks must fail here at the FCC.

Verizon's Petition was based on the intertwined propositions that TELRIC pricing is below the incumbent's cost and that TELRIC pricing has contributed materially to a supposed massive decline in investment in the telecommunications industry. Verizon's supporters add nothing new to either proposition. The Petition must be denied.

II. The comments from Verizon's supporters do not validate Verizon's Petition.

As noted above, only four of the comments support Verizon's Petition: ACS, Qwest, SBC and USTA. USTA's comments bring absolutely nothing to the debate, merely parroting the themes of the Verizon Petition and adding no supporting information.

SBC has three points to make: 1) that there is no "principled basis" for applying TELRIC, rather than the 47 U.S.C. § 252(d)(3) resale discount, to the UNE-P¹⁵; 2) that the application of TELRIC to the UNE-P has harmed the public interest¹⁶; and 3) that forbearance will benefit consumers.¹⁷

NASUCA will address these three points in reverse order. According to SBC, the "benefit" that consumers will receive if the UNE-P is eliminated is facilities-based

¹⁴ Perhaps one could refer to SBC's legislative victory in Illinois as a "legal challenge." In Illinois, SBC didn't like the results of the state commission's effort under state law, so it changed the state law. The result was found to violate federal law. *Voices for Choices v. Illinois Bell Tel.*, No. 03-C-3290 (N.D. Ill. June 9, 2003), 2003 U.S. Dist. LEXIS 9548.

¹⁵ SBC at 3-7.

¹⁶ SBC at 7-13.

competition. Of course, SBC's argument depends on accepting the idea that the UNE-P has "stifled investment by both incumbents and competitors."¹⁸ SBC's argument, like Verizon's, collides head-on with the Supreme Court's finding in *Verizon*: It "suffices to say that a regulatory scheme [UNEs priced at TELRIC] that can boast such substantial competitive capital spending over a 4-year period is not easily described as an unreasonable way to promote competitive investment in facilities."¹⁹ The Supreme Court found that the Commission's UNE and TELRIC orders furthered the purposes of the Telecommunications Act of 1996²⁰ ("the Act").²¹

SBC also trots out the tired claim that "price advantages accrue only to those few high revenue consumers targeted by UNE-P carriers, and come at the sacrifice of the remaining consumers left to be served by the incumbent."²² Although advocates were concerned that CLECs might target only high revenue customers, that has not been shown to be the case (and SBC provides no data to support its argument)²³; further, there has been no showing that the consumers who remain with the incumbent have been harmed. See NJRPA at 19 ("[E]ven customers who remain with the ... ILEC ... benefit from the competition, because the competitive pressures force the ILEC to meet CLEC offerings.")

¹⁷ SBC at 13-14.

¹⁸ SBC at 13.

¹⁹ *Verizon*, 535 U.S. 517; see also *id.*, n.33. The D.C. Circuit's reliance in *USTA* on the existence of "synthetic competition" (see SBC at 13) seems to express a desire to overturn the Supreme Court's finding.

²⁰ Pub L. 104-104, 110 Stat. 56.

²¹ *Verizon*, 535 U.S. 539.

²² SBC at 14.

More importantly, SBC's notion of customer benefits overlooks the extreme unlikelihood that doing away with the UNE-P will actually promote significant facilities-based competition. The possibility that, if access to the UNE-P combination is denied, CLECs will actually build their own switches and other facilities to serve mass market customers within any reasonable timeframe, has no support in the comments here or in the record of the Triennial Review proceeding.²⁴ Rather than increasing competition for mass market customers, eliminating the UNE-P will deprive most of those customers of the competitive choices they already have.

For example, depending on the state, between 55% and 94% of the residential local competition in SBC territory in Indiana, Illinois, Ohio and Wisconsin relies on the UNE-P.²⁵ TEXALTEL states it belief that "[i]n Texas ... approximately 90% of the access lines served by competitors are served via UNE-P."²⁶ And Logix shows that even

²³ PACE (at 12-13) shows the ubiquity of UNE-P competition in rural, suburban and urban areas.

²⁴ TEXALTEL states:

Even if competitors could duplicate Verizon's network, ... public policy should move them toward building what Verizon does not have -- newer facilities, innovative technologies and provision of services that Verizon does not today provide. Preoccupying them with the need to build, in a short span of time, the same facilities that already exist, in order to continue providing the same services to the same customers that they serve today, would be a huge waste, assuming that it was even conceivable that they could do so.

TEXALTEL at 6.

²⁵ *In the Matter of Application by SBC Communications, Inc. for Authorization to Provide In-Region InterLATA Services in the States of Illinois, Indiana, Ohio, and Wisconsin*, WC Docket No. 03-167 ("SBC Ameritech Region Application"), Evaluation of the United States Department of Justice (August 26, 2003) at 7.

²⁶ TEXALTEL at 3.

it, a primarily facilities-based provider, needs access to the UNE-P in order to provide ubiquitous coverage within its service territory.²⁷

SBC's argument that application of TELRIC pricing to the UNE-P has harmed the public interest is equally unavailing. In pursuit of that argument, SBC aptly demonstrates that there has been "dramatic" growth in the use of UNE-P, especially in SBC territory.²⁸ SBC also correctly notes that the rates for the individual piece parts of the UNE-P have been "ratcheted down" by state commissions.²⁹ SBC also shows that CLECs are not leasing many loops independent of the UNE-P.³⁰ So far, no harm, no foul.

SBC admits in the end that its entire argument depends on TELRIC prices being below cost, and that is where the argument falls apart:

Such statistics would not be cause for alarm if UNE-P were priced in accordance with a rational wholesale business model. Unfortunately, however, the application of the Commission's UNE pricing rules to UNE-P have produced a situation that is far from rational and certainly not economically sustainable. It is simply not possible to maintain a viable wholesale business when an incumbent's operating costs average \$26 or more but the price charged for wholesale products averages \$15 or less.

Id. at 11-12. Again, TELRIC has been upheld by the Supreme Court; again, no RBOC has successfully challenged a state UNE or UNE-P rate (which would surely be the case if TELRIC rates were so far below the incumbent's actual costs)³¹; and, again, no RBOC

²⁷ Logix at 6.

²⁸ SBC at 7-8, 9.

²⁹ *Id.* at 8-9. SBC complains loudest about decreases in the prices for local switching: "This disproportionate focus on rates for unbundled switching -- which is almost never purchased other than as part of UNE-P -- evidences a clear intent to ratchet down UNE-P prices." *Id.* at 8, n.18. This blanket disdain for the decisions of the regulators in the SBC states should not go unnoticed.

³⁰ *Id.* at 10-11.

³¹ In Illinois, even after the SBC-inspired legislative tinkering with TELRIC, the adjusted statewide UNE-P rate is \$19. *Voices for Choices v. Illinois Bell Tel. Co.*, Case No. 02-2735 (7th Cir.), Brief of SBC at 16.

has shown that its financial woes are the result of TELRIC pricing.³² SBC also throws in the argument about UNE-P being the cause of declining telecom investment, but gives no factual support. SBC at 12. SBC's comments provide little that is new, and do not support forbearance.

SBC's other argument is that the Commission should "determine that purchase of a preassembled end-to-end platform of elements in the incumbent's network is functionally no different than resale and to forbear from applying its TELRIC and access pricing rules to UNE-P." SBC at 7. Unfortunately, SBC fails to explain why forbearance is required under the Act because of this lack of functional difference.³³

The Act provides alternatives for competitive service. The Act provides that competitors may resell an ILEC's services. 47 U.S.C. § 251(c)(4).³⁴ The Act also provides that competitors may lease the ILEC's unbundled network elements. 47 U.S.C. § 251(c)(3). The Act expresses no preference for whether a competitor uses one strategy or the other.³⁵ As Sage states, "Verizon again confuses sections 251(c)(3) and 251(c)(4) of the Act, which gives new entrants *the right* to choose between resale and UNEs."³⁶

³² See *Triennial Review*, AT&T *ex parte* filings (October 2, 2002 and October 29, 2002). Recent reports to the Public Utilities Commission of Ohio show that SBC Ohio is earning, in these days of record low interest rates, a respectable 9.43% return on equity on its Ohio operations. See also Logix at 5, n.2.

³³ See Z-Tel (at 19-23) for a discussion of functional differences between resale and service offered over the UNE-P.

³⁴ Z-Tel explains that the wholesale rates being paid by resellers are not cost-based, because they result from applying a wholesale discount to the incumbent's retail rates which are only coincidentally cost-based. Z-Tel at 19.

³⁵ Indeed, the Act also provides for interconnection between incumbents' networks and networks constructed by competitors, 47 U.S.C. § 251(c)(1), and again expresses no preference for that form of competition.

³⁶ Sage at 11 (citation omitted) (emphasis added).

The law allows competitors to combine those unbundled elements. 47 U.S.C § 251(c)(3). The Supreme Court upheld the Commission's decision to require the incumbents *not* to "break apart" currently combined elements.³⁷ Thus rather than being a "creation" of the FCC, the UNE-P is a combination of network elements existing in the ILECs' networks that is conceptually and legally no different from any other combination required to be offered to, and used by, CLECs.

The fact that the UNE-P can be used to provide most of the local exchange services that competitors could purchase at wholesale rates should be irrelevant to whether TELRIC applies to this combination as it does to other combinations and to the individual UNEs. The fact that applying the TELRIC standard -- which, we repeat, has been upheld by the Supreme Court -- to the UNE-P gives a financial advantage to the UNE-P over resale, is a coincidence of the combination of the law and the Commission's decisions, *but does not itself create a ground for forbearance*.³⁸ And SBC presents no reason -- other than the coincidence of financial advantage to CLECs -- for there to be forbearance because of the economic advantage of UNE-P.³⁹

Qwest, for its part, presents what it claims are "data specific to the Qwest territory that confirms the anti-competitive effects arising from the application of the TELRIC

³⁷ *AT&T Corp. v Iowa Utils. Bd.*, 525 U.S. 366, 393, 179 U.S. 721 (1999) ("*Iowa Utilities*").

³⁸ Although it is true that the "Court said nothing to foreclose the Commission from forbearing from application of any of its UNE pricing rules to UNE-P" (SBC at 7, n.14), those seeking forbearance are still required to meet the tests of § 10 of the Act. Verizon and its supporters fail miserably at that task.

³⁹ WorldNet provides an example of a carrier for which "resale is merely an initial step in [a] long-term strategy of constructing its own facilities and becoming a facilities-based provider of bundled services...." WorldNet's current strategy for deploying its own facilities-based network involves migrating its services from resale, to UNEs, and finally to its own facilities." WorldNet at 2.

methodology to UNE-P.”⁴⁰ Qwest begins by listing current 2-wire loop rates throughout its territory.⁴¹ Qwest does not mention any other part of the total price for the UNE-P. Qwest then attributes these rates to the “inherent flaws in the TELRIC methodology.”⁴² This view, like Verizon’s, ignores the Supreme Court’s approval of TELRIC, and also looks that even if the UNE-P goes away, the loop UNE will remain. This shows clearly that the attack is on TELRIC pricing generally, and not just on its use for the UNE-P.

Qwest then, like SBC, points to a “dramatic increase” in the use of UNE-P, especially as compared to the UNE-L.⁴³ But this complaint, like SBC’s, also depends on there being something improper about the TELRIC pricing of the loop and the rest of the UNE-P. As discussed below, these complaints are baseless.

ACS focuses on its market, Anchorage, purporting to show the impacts of the UNE-P on its operations there.⁴⁴ ACS’s demonstration for the Anchorage market -- weak as the demonstration is -- does not lend much support to Verizon’s -- and SBC/BS/Q’s -- requests for forbearance on the *national* level. ACS attempts to show that “forbearance ... is warranted in the Anchorage market.”⁴⁵ Unfortunately, ACS has not petitioned for forbearance in that much more limited market.

⁴⁰ Qwest at 2.

⁴¹ *Id.* at 3.

⁴² *Id.* at 4.

⁴³ *Id.* at 4-6.

⁴⁴ ACS at 1.

⁴⁵ *Id.*

Astoundingly, ACS admits that the competition it faces in Anchorage operates “*completely without* the use of UNE-P....”⁴⁶ This competition has cost ACS 45% of its market share. *Id.* To quote a catchphrase of the 1980s, “Where’s the beef?” ACS’ situation is not grounds for forbearance on the UNE-P.

In fact, the beef is that, despite its support for Verizon’s Petition that is limited to the UNE-P, ACS’ true goal is forbearance from the TELRIC standard for all UNEs only in Anchorage.⁴⁷ That issue belongs in another petition for forbearance and need not be addressed further here.

III. The comments show that Verizon’s Petition is not appropriate for forbearance.

Z-Tel points out that Verizon is not asking for forbearance from applying the TELRIC standard to the UNE-P, but is instead asking to substitute the resale pricing scheme for TELRIC.⁴⁸ Indeed, the Petition “also asks the Commission to ‘*revise* its pricing rules so that UNE rates are set based on the incumbent’s actual forward looking costs.’”⁴⁹

As Z-Tel states,

By seeking forbearance, a party asks the Commission not to enforce a regulation in certain circumstances. Indeed, the text of section 10(a) provides for forbearance only with respect to a specific “telecommunications carrier or telecommunications services, in any or some of its or their geographic markets.” Thus forbearance is similar to

⁴⁶ *Id.* at 2 (emphasis in original).

⁴⁷ *Id.* at 11.

⁴⁸ Z-Tel at 5.

⁴⁹ *Id.*, quoting Petition at 19 (emphasis added by Z-Tel); see also AT&T at 3; MCI at 2-4.

seeking a waiver, and different from requesting a wholesale amendment or change to a regulation.

Z-Tel at 6. The Verizon Petition actually requests a change to a regulation, and should be denied for this reason.⁵⁰

Numerous commenters also correctly point out that the Commission is forbidden by 47 U.S.C. § 160(d) from forbearing from applying the requirements of section 251(c) -- precisely the section from which Verizon seeks forbearance -- until the Commission “determines that those requirements have been fully implemented.” The Commission has made no such determination. AT&T at 22-29; MCI at 19-28; see also PACE at 6-9; CompTel at 2; Covad at 2; CaPUC at 12; Sprint at 17; Telscape at 5-6; BridgeCom at 3-7; Sage at 3-5.

IV. The comments show that the TELRIC standard is reasonable.

As ASCENT, et al. note,

Verizon’s sole evidence of its claims of “artificially low rates” are a series of financial analysts reports. As a threshold matter, ... Verizon is asking the Commission to weigh the reports of organizations whose area of expertise is not to conduct cost proceedings over the findings of state commissions who have been setting rates for the RBOCs for years.

ASCENT, et al. at 5.⁵¹ Logix states,

To believe the *Verizon Petition*, one would have to conclude that there is a vast conspiracy that has taken over the utility commissions of most of the Verizon states. Moreover, one would have to conclude that those same commissions are all separately choosing to violate the federal law by imposing low rates without regard to the FCC’s pricing methodology. ...

⁵⁰ In contrast to Verizon’s national request to amend the UNE-P rules for all ILECs, if ACS had filed a separate request for forbearance applicable only to ACS in Anchorage, that might have fit within the purview of the statute. Of course, ACS did not file its own petition for forbearance.

⁵¹ ASCENT points out other flaws in the analysts’ reports. *Id.* at 5-6.

Without using the words, Verizon accuses each of the state commissions of fraud and theft with the obvious implication that the states have intentionally manipulated the FCC's pricing rules to achieve a results-oriented conclusion.

Logix at 4.

Z-Tel provides some very good reasons why Verizon's UNE rates continue to decline: "Verizon has consistently proposed inflated rates for UNEs that bear no relation to the Commission's TELRIC pricing rules." Z-Tel at 30; see also *id.* at 30-32; Logix at 4-5. MCI points out that "early rates were often as not based on Bell inputs that misrepresented facts in devious ways that were not uncovered until years later," using the Verizon New York, New Jersey and Pennsylvania proceedings as examples.⁵² And AT&T identifies the "true causes" of the decline in UNE rates: "state commissions' discovery and correction of Verizon's cost study duplicity in the initial round of UNE rate cases, substantial real-world cost reductions in switching and other electronic equipment, and *Verizon's* own proposals to reduce its own UNE rates by as much as 50%."⁵³

ASCENT, et al. provide a detailed "walk through" of the Supreme Court's decision in *Verizon* that demonstrates the extent of the Supreme Court's support for the Commission's rulings on the TELRIC standard, whether used for the UNE-P or for all UNEs. ASCENT, et al. at 8-14; see also Focal, et al. at 5-13. PACE puts the "below-cost" issues into clear perspective:

UNE-P has not harmed Verizon, as one look at Verizon's financial statements amply demonstrates. Despite the alleged horror of UNE-P

⁵² MCI at 33-34.

⁵³ AT&T at 7-8 (emphasis in original).

competition, Verizon and the other BOCS continue to earn record profits. In 2002 -- despite a recession that transcended industries and economies -- Verizon earned **\$4.8 billion in free cash flow**. That is, after paying everyone -- Ivan Seidenberg, lawyers, country clubs and the IRS -- Verizon had **\$4.8 billion** in cold, hard cash left over.

PACE at 14 (emphasis in original).

V. Verizon’s arguments on access charges are unconvincing.

Z-Tel points out that, contrary to Verizon’s argument (Petition at 4), the Commission specifically found that competitors using UNEs “can provide telecommunications services *including* exchange access.” Z-Tel at 24 (citing *First Local Competition Order*⁵⁴ at 15679, ¶ 356) (emphasis in Z-Tel); see also ASCENT, et al. at 20; A+, et al. at 9; PACE at 4; MCI at 8-12. Further, “allowing incumbents to charge TELRIC-based rates for leasing the UNE platform and recover exchange access charges for calls would constitute double recovery of costs.” Z-Tel at 27, citing *First Local Competition Order* at 15682, ¶ 363, n.772; see also ASCENT, et al. at 22-23; Sage at 8.

VI. The current pricing rules have not contributed materially to a decline in investment in the industry.

The decline in telecom industry investment after 2000 -- a key part of Verizon’s argument -- must be seen in context: “2000 represented an unprecedented peak in stock market valuations for the macro-economy and an unprecedented peak in historical levels of telecommunications investment.”⁵⁵ Z-Tel notes that “declining investment is better explained by factors outside the Commission’s control, such as the sluggish economy and

⁵⁴ *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) (“*First Local Competition Order*”).

the ability of firms to acquire assets from bankrupt carriers at ‘fire sale’ prices.” Z-Tel at 39; see also ASCENT, et al. at 3; NJRPA at 12-13; CompTel at 6, n.17; WorldNet at 6. As ASCENT, et al. graphically state, “Capital expenditures are down because there is no capital to invest.” ASCENT, et al. at 16; see also *id.* at 29; Focal, et al. at 21; PACE at 14; TEXALTEL at 4-5. And as WorldNet states, Verizon is “fingering TELRIC as the sole root cause of all the structural problems that have caused the decline in the telecommunications industry over the past three years.”⁵⁶

Z-Tel also extensively discusses the two Phoenix Center for Advanced Legal and Economic Public Policy Studies cited by NASUCA.⁵⁷ The first study notes that “[d]espite recent declines in investment caused in part by the near-total collapse of facilities-based CLECs, telecommunications investment remains well above historical levels.”⁵⁸ More to the point, the second study shows that although “BOC net investment fell by about 7% in 2002, investment dollars were more heavily allocated to states with greater levels of UNE-P competition, and this additional investment offsets the total decline in investment by about 50%.”⁵⁹ MCI presents similar information from two other studies.⁶⁰

Z-Tel concludes, correctly, that “Verizon’s erroneous argument that the UNE platform has deterred investment provides no reasonable basis on which to amend the

⁵⁵ CompTel at 6, n.17.

⁵⁶ WorldNet at 6.

⁵⁷ Z-Tel at 39-42; see NASUCA at 16; see also NJRPA at 14.

⁵⁸ “The Truth About Telecommunications Investment After the Telecom Act” (June 24, 2003) at 1, available at <http://www.phoenix-center.org/PolicyBulletin/PolicyBulletin4Final.pdf>.

⁵⁹ “Competition and Bell Company Investment in Telecommunications Plant: The Effects of UNE-P” (July 9, 2003) at 1, available at <http://www.phoenix-center.org/PolicyBulletin/PolicyBulletin5.pdf>.

⁶⁰ MCI at 39-40.

Commission's rules in the manner Verizon proposes.”⁶¹ And Sage asserts that “Verizon fails to provide any evidence whatsoever to demonstrate that TELRIC pricing methodology or UNE-P is to blame for the woes of which it complains.”⁶² NASUCA agrees.

VII. The pricing rules have not prevented the development of a rational wholesale market.

Verizon claimed that the use of TELRIC destroyed the potential for a rational wholesale market.⁶³ A key piece of Verizon's support was the assertion that the arbitrage between resale and UNEs allowed by TELRIC had “spawned the creation of a cottage industry dedicated to helping companies ‘become a UNE-P CLEC’”⁶⁴ AT&T's response cuts the legs from under this assertion: [E]ntire “cottage industries” of “consultants,” however, also promise lucrative returns from penny stocks, Ponzi schemes, and Nigerian advance-fee frauds. Only the gullible take these offers seriously.”⁶⁵ The Commission should not take Verizon's argument seriously.

VIII. Verizon has not met its burden on forbearance.

⁶¹ Z-Tel at 42.

⁶² Sage at 3.

⁶³ Verizon Petition at 11-12.

⁶⁴ *Id.* at 8.

⁶⁵ AT&T at 8.

The forbearance test of 47 U.S.C. § 160 has three prongs: prevention of unjust rates and discrimination; protection of consumers; and protection of the public interest.

With regard to discrimination, ASCENT, et al. point out that

the current pricing rules do ensure nondiscriminatory charges, practices, classifications and regulations. ...[T]he pricing rules ensure that Verizon does not discriminate against its competitors. Forbearing from those rules would permit Verizon and other ILECs to impose excessive UNE rates on CLECs.

ASCENT, et al. at 25; see also A+, et al. at 10; PACE at 10-11; CompTel at 8; Sprint at 11-12; AT&T at 33-38; MCI at 14.

With regard to benefits to consumers, ASCENT, et al. also point out that

utilizing UNEs to serve customers can be more efficient than deploying redundant facilities prior to a time when those facilities are needed or are economic. This efficiency, in turn, produces competitive rates for consumers and avoids the cost of underutilized, duplicative facilities.

Id. at 28; see also PACE at 11-13; CompTel at 8-10; Sprint at 13-14; MCI at 14-16.

Finally, with regard to the public interest prong of the forbearance test, ASCENT, et al. note that

[I]n a declining market, it is all the more important that the Commission refrain from drastically altering the existing regulatory environment. ... The public interest requires that the Commission reject Verizon's request and retain its existing UNE pricing and access charge rules.

Id. at 30; see also Sprint at 14-15.

Thus Verizon's Petition fails on all three prongs of the forbearance test. See A+, et al. at 12-13; CompTel at 10-11; AT&T at 48-50; MCI at 16-18; Telscape at 11-15; BridgeCom at 12-18.

Lest the Commission think that the opposition to forbearance comes only from competitors, the Pennsylvania Public Utility Commission -- regulator in one of Verizon's home states -- makes very clear its opposition to Verizon's petition: "Granting the

petition could threaten the just and reasonable pricing of the UNE-P, consumer protections and the public interest.”⁶⁶

IX. Conclusion

This latest attack on the UNE-P is significant because it comes just a few months after the Commission itself decided **not** to eliminate the platform, as the incumbents had requested.⁶⁷ The Commission refused to find that a key piece of the UNE-P -- local switching for the mass market -- was no longer subject to unbundling, as the ILECs wished.⁶⁸ Instead, the Commission deferred to the states the task of assessing whether there is impairment of competition in the absence of UNEs -- including the “piece parts” of the UNE-P, consistent with *USTA v. FCC*.⁶⁹ Virtually all of Verizon’s arguments in the Petition were presented to the Commission -- in one form or another, by one ILEC or another -- and rejected in the Triennial Review Order.

Verizon’s -- and the other incumbents’ -- desire to eliminate the UNE-P is understandable. UNE-P-based competition represents much of the residential local service competition seen around the country. If TELRIC were priced below cost, and if the UNE-P were draining the revenue lifeblood from the incumbents -- as Verizon argues it is -- one would expect the incumbents to be suffering financially. Yet the incumbents’ reports to industry analysts show good health, far better than the CLECs who are

⁶⁶ PaPUC at 3; see also *id.* at 4-6.

⁶⁷ See *Triennial Review Order* at, e.g., ¶ 94.

⁶⁸ See, e.g., *Triennial Review Order* at ¶ 479.

supposedly arbitraging huge profits from the local service. Verizon's Petition is an attempt to ensure continued market dominance, rather than seeking protection from unjust or unreasonable wholesale rates.

CompTel aptly sums up the issues here:

Verizon's Petition essentially repeats the same fundamental arguments that it made, and the Commission rejected, in the first Local Competition Order. Moreover, Verizon concedes, as it must, that the Supreme Court found both the UNE Platform rules and the TELRIC methodology to be reasonable interpretations of the Act. Similarly, the Commission declined to adopt most of the changes Verizon seeks (eliminating UNE-P, or pricing it at resale rates, and preventing UNE-P-based carriers from providing exchange access) in the intervening *UNE Remand Order* and ... in the *Triennial Review Order*. Verizon makes no new arguments and introduces no facts at all.

CompTel at 5-6 (citations omitted); see also WorldNet at 4-5.

Verizon would have this Commission forbear from requiring incumbents to provide the combination of network elements that is the source of most residential competition in this country, based on the forward-looking cost standard upheld by the United States Supreme Court. Neither Verizon nor its supporters have presented a shred of credible evidence to meet the statutory requirements for forbearance. Verizon's Petition should be denied on an expedited basis.⁷⁰

The issues raised by Verizon, to the extent they have not already been conclusively dealt with by the Commission or the Supreme Court, can be effectively addressed in the state-level impairment proceedings arising from the *Triennial Review*

⁶⁹ *USTA v. FCC*, 290 F.3d 415 (D.C. Cir. 2002); *Triennial Review Order* at ¶¶ 493. The state proceedings on mass market switching are required to be completed within nine months of the effective date of the Triennial Review Order. *Id.* at ¶ 527.

⁷⁰ The Commission can expect to see these same arguments in response to the Public Notice on the SBC/BS/Q Petition. Public Notice, DA -03-2679 (rel. August 18, 2003).

Order and in the TELRIC rulemaking predicted in the *Triennial Review Order*.⁷¹ See Covad at 1; NYDPS at 2-3; Focal et al. at 16-18. This is just another reason to deny Verizon's petition.

Respectfully submitted,

David C. Bergmann
Assistant Consumers' Counsel
Chair, NASUCA Telecommunications
Committee
bergmann@occ.state.oh.us
Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
Phone (614) 466-8574
Fax (614) 466-9475

NASUCA
8300 Colesville Road (Suite 101)
Silver Spring, MD 20910
Phone (301) 589-6313
Fax (301) 589-6380

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⁷¹ *Triennial Review Order* at ¶ 676.